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Jury Nullification: What Judges & Lawyers Won't Tell You

William Penn may have thought he had settled the matter. Arrested in 1670 for preaching Quakerism, Penn was brought to trial. Despite Penn's admitting the charge, four of the 12 jurors voted to acquit. The judge sent the four to jail "without meat, drink, fire and tobacco" for failing to convict Penn.

On appeal, however, the jurors' action was upheld and the right of juries to judge both the law and the facts -- to nullify the law if it chose -- became part of British constitutional law.

It ultimately became part of American constitutional law as well, but you'd never know it listening to jury instructions today almost anywhere in the country. With only a few exceptions, juries are explicitly or implicitly told to worry only about the facts and let the judge decide the law. The right of jury nullification has become one of the legal system's best kept secrets.

Now a remarkable coalition has sprung up to challenge this secrecy as undemocratic, unconstitutional and dangerous. Though organized by libertarian activists, the Fully Informed Jury Amendment movement includes liberals and conservatives, Greens, drug decriminalization advocates, gun owner groups, peace activists, both sides of the abortion controversy, helmet and seatbelt activists, alternative medicine practitioners, taxpayer rights groups, environmentalists, criminal trial lawyers and law professors.

Organized by Larry Dodge and Don Doig, both of Helmville, Montana (population: 26; elevation 4300'), FIJA seeks to require that juries be informed of their nullification rights.

Informed jury amendments have been filed as an initiative in seven states and legislation has been introduced in the Alaska state legislature. In Arizona, a bill was killed in committee but only narrowly (4-3 in one committee and 4-4 in another).

Merely raising the issue of nullification can make prosecutors nervous, for it takes only one person aware of the right in order to hang a jury. In Washington, DC, where the concept has been discussed in connection with the Marion Barry trial, a local television station recently reported that the US Attorney was worried that a jury might nullify the law in that case. The joke in DC was that Barry was campaigning, but only for one vote, that of a single juror. The specific charges against Barry revolve around his alleged use of drugs and a growing number of people are coming to accept the argument that drug use or addiction should not be a criminal offense

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Despite the refusal of courts to inform juries of their right to nullify, American juries have periodically exercised it anyway. In recent years, some peace protesters have been acquitted despite strong evidence that they violated the law. In the 19th century northern juries would refuse to convict under the fugitive slave laws. And in 1735 journalist Peter Zenger, accused of seditious libel, was acquitted by a jury that ignored the court's instructions on the law.

Those who have endorsed the right of a jury to judge both the law and the facts include Chief Justice John Jay, Samuel Chase, Dean Roscoe Pound, Learned Hand and Oliver Wendell Holmes.

According to the *Yale Law Journal* in 1964, during the first third of the 19th century judges did inform juries of the right, forcing lawyers to argue "the law -- its interpretation and validity -- to the jury." By the latter part of the century, however, judges and state law were increasingly moving against nullification. In 1895 the US Supreme Court upheld the principle but ruled that juries were not to be informed of it by defense attorneys, nor were judges required to tell them about it. Stephen Barkan, writing in *Social Problems* (October 1983), noted that the attacks on nullification stemmed in part from juries acquitting strike organizers and other labor activists. And in 1892 the *American Bar Review* warned that jurors had "developed agrarian tendencies of an alarming character."

Thomas Jefferson, as usual, put it well when he said: "If a juror accepts as the law that which the judge states then that juror has accepted the exercise of absolute authority of a government employee and has surrendered a power and right that once was the citizen's safeguard of liberty, -- for the saddest epitaph which can be carved in the memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Today, the constitutions of only two states -- Maryland and Indiana -- clearly declare the nullification right, although two others -- Georgia and Oregon -- refer to it obliquely. The informed jury movement would like all states to require that judges instruct juries on their power to serve, in effect, as the final legislature of the land.

This is not an arcane demand nor is it an anarchistic one. No one is arguing the right of juries to convict in an arbitrary fashion nor to declare a law unconstitutional, merely the right described by George Bernard Shaw, "to deliver an accused person from both the police and the letter of the law."

As the diverse nature of the movement suggests, many groups in this country feel the government has overstepped its power in some way and that there must be protection for the natural rights of American citizens. They are defending not only the right to protest or carry a gun or not wear seatbelts but challenging the right of the government to decide such matters without the mediating effect of a jury's judgement of fairness in a particular case.

For many liberals and progressives, who tend to be confident of the beneficent nature of government power, such a challenge may be a bit uncomfortable -- understandable in a case involving a peace protest, less appreciated if invoked by a member of the National Rifle Association. The libertarians argue that the two are of one cloth. As government intrusion in individual matters has increased, the libertarian view has gained influence, helping to tilt normal left-right divisions on their side. Libertarians, for example, have been key to the growing opposition to the barbaric Reagan-Bush war on drugs, providing some of the best analysis and advocacy available on the issue.

Libertarians are again in the lead on the nullification issue. Many progressives may be uneasy about the thought of a western jury nullifying a case involving a gun control or seatbelt law, but this unease reminds one of little discussed principles that were once considered central to being an American -- not the least of which was freedom from some government official telling you how to live your life. As the design of the modern centralized welfare state frays and becomes increasingly authoritarian, reacquaintance with

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some of our individualistic roots nas much to recommend it.

In fact, it is unlikely that a jury considering a gun control case would excuse the leader of an underground Nazi movement or a gang of bank robbers. It is far more likely that it would acquit the respectable rancher who simply believes that gun control represents further destruction of his paradigm of individual liberty. If so, what have we lost?

The history of jury nullification suggests there is little to fear. In those states where the concept is respected to some degree it has had minimal effect on the overall functioning of the law. Nullification has, on the other hand, played a little noted but significant role in the advance of religious and press freedom, the abolition of slavery and the building of a labor movement. Even in the face of hostility by contemporary courts, it has cropped up in political protest trials of the past few decades. And it might have surfaced more frequently absent that hostility. As one of the jurors said following the conviction of the Berrigan brothers in 1980:

We convicted them on three things, and we really

Notes from the Last Colony

Like many in DC, your editor has been fumbling his way towards support of various local candidates for public office. It hasn't been easy this year what with an excess of candidates and a paucity of appealing ones. But for the benefit of DC readers, here's my progress to date:

For Mayor: Charlene Jarvis
For City Council Chair: John Wilson
For Delegate: Eleanor Holmes Norton
For City Council At Large: Hilda Mason
For Ward 3 City Council: Jim Kalish
For Shadow Representative: Tom Chorlton

The only surprise here, I suppose, is in the mayor's race. I came to support Charlene Jarvis by a process of elimination. Three of the candidates -- Barry, Fauntroy, and Ray -- have little to offer the city. Their campaigns seem driven by personal ambition devoid of public purpose.

You don't need a urine test or hair sample to know that Barry has not, in recent years, been a good mayor. The cynical and unwarranted intrusion of the federal government into this campaign through the carefully timed sting and indictment of the mayor, bad as it has been, is in no way a justification for another term.

Fauntroy is amiable enough but his poor handling of the relatively easy job of delegate, his mangling of the statehood issue, and his chronic revisionist bragging about the past and unconsumated predictions for the future make him a poor choice for the job.

Ray wants to be mayor and it is the consistency of this desire that is his major political attribute. He has produced little legislation of note (unless you include his plan to regulate the city's non-existent sperm banks) and can be as testy as Dave Clarke when challenged. He benefits from the informed support of developer-business interests who believe he would be their sort of mayor and from less well-informed support in Ward 3 that is apparently unaware of what Ray says about them elsewhere, has forgotten that his early role in this campaign was as heir apparent to the Barry machine, and hasn't realized that he is backed by the very development interests they have been fighting all these years. Ray's positions tend to be in lockstep with the big business, as with rent control, or gratuitously punitive, as with drug issues. He would not be an imaginative, sensitive or pleasant mayor. Besides he once attempted to ban live music in neighborhood bars. As Shakespeare warned, "The man that hath no music in himself *** Let no such man be trusted."

I could vote for either Jarvis, Pratt or Clarke but settled on Charlene for largely non-ideologicial reasons. Jarvis's biggest errors --both of which she appears to recognize -- were her involvement with the rent control bashers early in her political career and various ethical pecadillos revolving around the introduction of cross-state banking in DC. She was wrong on both counts but, unlike most of the other candidates, she has improved with age, a rare and good sign in a politician.

Jarvis is the candidate who has moved the farthest from the punitive approach to the drug problem. This alone puts her ahead of the other candidates. As a former scientist, she innately understands the problem with treating a health matter as a legal proposition.

She has one of the best minds on the council. Her intelligence is not just computational or logical; it is also social intelligence, of the sort highly desirable in a mayor.

She is a skillful compromiser and, as a consequence, would probably not be a notably progressive mayor. But at a time when the city is more fratured, confused and disorganized than it has been in years, Jarvis would stand the best chance of putting things together again. She, more than any of the candidates, exudes an aura of Washington at its best -- not the Washington of the wheeler-dealer and hustler, nor the Washington that translates every human situation into bureaucratic or budgetary solutions, but a Washington of decent people trying to survive and find happiness. Her politics seem the most human of any of the candidates. It is rooted in the reality of people and their communities and she has shown an attention to the little details that make a city work, as exemplified by her efforts to get developers to provide day care facilities or the imaginative STARS program, which uses teenagers to tutor elementary school kids in danger of failing or running afoul of the law. There's a lot more to running a city than budgets, laws and pronouncements. We've tried living on little else but these for some time now and it hasn't worked. What we need now is a mayor with an unforced appreciation for, understanding of, and ability to deal with, all the little pieces that add up to DC. Of the candidates, Charlene Jarvis comes closest to filling the bill. -- *Sam Smith*

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didn't want to convict them on anything. But we had to, because of the way the judge said the only thing that you can use is what you get under the law... I would have loved to hold up a flag to show them we approved of what they were doing. It was very difficult for us to bring in that conviction.

The nullification principle involves the power to say no to the excesses of government, and thus serves as a final defense against tyranny. As Thomas Jefferson put it to Tom Paine in a 1789 letter, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." -- *Sam Smith*

More information on the jury nullification can be obtained from the Fully Informed Jury Amendment, PO Box 59, Helmville MT 59843.

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The Environment by the Numbers

Percent of groundwater used for drinking that is contaminated: 29%
Number of discharge pipes legally dumping toxics into U.S. surface waters: 65,300
Percent of customers not notified when drinking unhealthy or potentially unhealthy water: 94%
Percent of EPA's enforcement budget appropriated to assure safe drinking water: less than 1%
Pounds of pesticides used in US: 2,600,000,000 anually (10 lbs. per person)
Number of U.S. farm workers affected by acute pesticide poisonings each year: 313,000
Percent of waste stream that is recyclable: 85
Percent currently recycled by Japan: 50
Percent currently recycled in the United States: 10
Cost of a building a typical 1,500 ton-per day incinerator: $200 million
Cost of building six Materials Recycling Facilities, able to recycle 1,500 tons of trash per day: $30 million
pH of a healthy lake: 6.5
pH of rain falling at the National Airport in Arlington, VA: 4.3 (20 times more acidic than normal)
Rank of active smoking, passive smoke and acid rain as causes of lung disease in the U.S.: 1, 2, 3
Number of air toxins released routinely in U.S.: 200
Number of air toxins regulated by the EPA: 7
Percent of original virgin, uncut forest remaining in the U.S.: 5
Number of people in developing countries killed annually from contaminated water: 25 million
Number of children in developing countries killed annually by contaminated water: 8 million
Number of gallons of water a single leaky faucet wastes per month: 4,000
Number of barrels of oil saved per day if all Americans lowered their thermostats by 6 degrees: 570,000
Number of pounds of household hazardous waste the average American generates per year: 160
Amount of garbage the average American generates per day: 3.5 lbs.
Number of trees it takes to produce our Sunday papers: 500,000
Percent of Sunday papers that are recycled: 12
Gallons of gas wasted in the U.S. in 1984 due to traffic congestion: 3 billion
Number of gallons of water one can of oil will contaminate: 65,000
Number of gallons of motor oil poured into U.S. water supplies annually: 257 million

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Drug Busts

Don't give us any good news

The testimony was before a congressional committee well covered by the press. But where, other than a good editorial in the *New York Times,* were the stories on the remarkable testimony by Dr. Robert Newman, president of the Beth Israel Medical Center in NYC? Here's what Dr. Newman told Congress:

- A study by the National Institute on Drug Abuse of 44,000 methadone patients enrolled in 52 treatment programs in the mid-seventies concluded that "average opiate use by clients in methadone treatment was reduced from 30 days per month to one or two days per month." A 1988 follow-up found that methadone maintenance reduces illicit opiate use by 66% to 80% over the first several weeks of treatment.
- More remarkable is the NIDA finding that, although methadone has no pharmacological effect on cocaine, **60% of those regularly using cocaine at the time of admission to methadone treatment had become abstinent in one year.**
- A GAO study found that after only six months of treatment, heroin use had stopped in at least 87% of patients in 14 of the 24 programs it investigated. The *worst* program eliminated heroin use among more than 50% of its patients. For New York City, the figures were between 95% and 98%.
- Further, the GAO study confirms that methadone can help with cocaine addiction. According to the GAO, between 60% and 100% of methadone maintenance patients had no evidence of any use of cocaine within a half-year of entering treatment. In three of the programs in New York City, where cocaine use among street heroin addicts is nearly universal, 85% or more of the patients had stopped taking cocaine.
- It is estimated that there are some 100,000 former addicts on methadone today, meaning over $4 billion a year in lost sales to drug dealers.

Dr. Newman told the legislators, "It is clear that methadone maintenance must be a cornerstone of our drug control strategy."

In the early 1970's NYC increased its methadone treatment capacity from 10,000 to over 50,000 in two years. But with the arrival of Ronald Reagan and his cynical war on drugs, drug use went up and money for treatment went down. Liberals and the media fell for the scam, and the result has been a decade of violence, increasing addiction and growing assaults on civil liberties. Now the media is so convinced of the Reagan-Bush propaganda on the subject, it won't even report good news that doesn't fit the drug war myth.

The price of fitting the profile

Meanwhile the absurd excesses of the drug was continue. *The Wall Street Journal* reported recently that the Coast Guard and Customs Service are searching and seizing pleasure craft they suspect of carrying drugs, often leaving the owners with thousands of dollars in damages. In one case Customs removed wood and fiberglass panels and drilled holes into the boat but found no drugs. Customs estimated damage at $1000, the limit of its liability. The owner estimated $4000. In another case the Coast Guard went after a 46-footer with chain saws and drills, ripping floorings and furnishings and leave 16-inch-square holes in the deck. The owners say the damage was $400,000; the Coast Guard doesn't agree so it's been taken to court.

The Feds and Barry

The Marion Barry case, which has attracted international attention, probably wouldn't have made it to court, let alone into the media, it hadn't been the name of the accused. A recent issue of the *Washington Times* reported that "some criminal justice experts nationwide said they are curious about the resources devoted to a case involving misdemeanor drug charges and perjury.

"'I had a drug agent call me and ask if we were going after misdemeanor cases now,' said one federal prosecutor who handles a high volume of drug cases. 'I said we are sticking with our five kilo limit.'" In short, the US Attorney in DC spent over a million dollars pursuing a penny ante case.

FIELD NOTES

Earth Education: A New Beginning: This book is based on the idea that environmental education has been trivialized by mainstream institutions, diluted by those with other agendas and co-opted by agencies and industries that have contributed to the problem. Steve Van Matre proposes an alternative with 300 pages of templates and tools for creating an educational response to our environmental crisis. $20.70 from The Institute for Earth Education, Box 288, Warrenville, IL 60555.

Building a More Democratic United Nations: A conference to be held Oct 13-15 in New York City by World Federalists and others *[Info: Dr. Harry Lerner, 301 East 45th St. #20B, NYC NY 10017]*

International Anti-Prohibitionist League: An international organization led by top critics of the drug wars. Memberships are $20. *[IAPL, 93, rue Belliard Bat REM.BUR 508, 1040 Brussels, Belgium]*

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The Weather Report

Making conservation pay

Applying traditional New England pragmatism to current environmental issues, several northeastern states are engaged in a novel approach to energy conservation. By incentives such as allowing utilities to earn slightly more profit on energy efficiency investment than on new power plants, these states have encouraged the power companies to push high-tech alternatives in electric motors, cooling equipment and building construction methods. According to the Safe Energy Conservation Council, such technologies could cut US power demand by 50 percent. For example, a compact fluorescent light bulb that fits into a conventional light socket can produce the same light with one-fourth the energy of a conventional bulb.

Ecological refugees

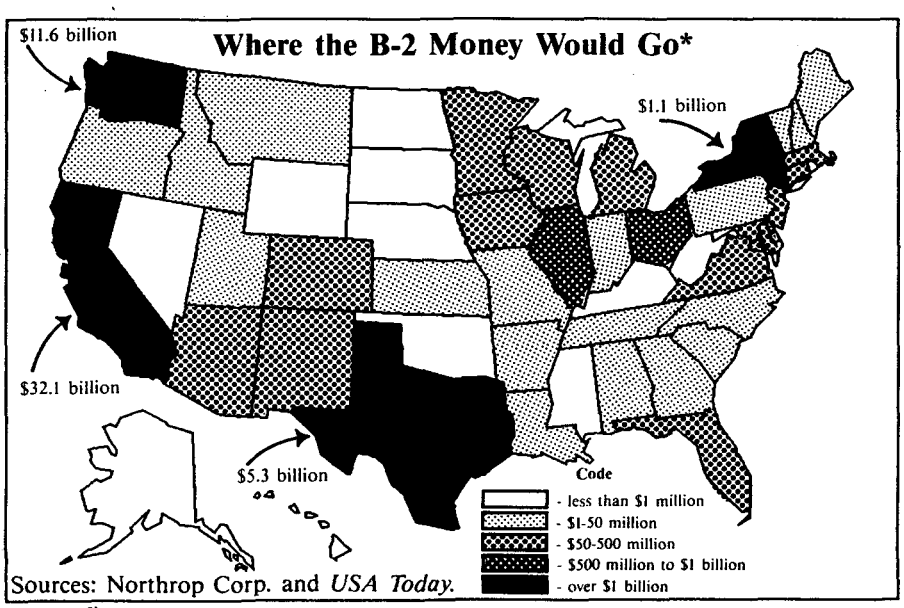
According to Jodi Jacobson of World Watch Institute, there are now at least 10 million ecological refugees -- people who have fled the environmental destruction of their homeland. Writing for Pacific New Service, Walter Truett Anderson notes that the specific causes of their uprooting are numerous: soil erosion and desertification; polluted water and/or depleted ground water supplies; deforestation that leads to shortages of firewood and still more soil erosion; and population growth, which sometimes actually increases in response to ecological crisis as families try to raise their survival odds. And, writes Jessica Tuchman Matthews in *Foreign Affairs,* "Wherever refugees settle, they flood the labor market, add to the local demand for food and put new burdens on the land, thus spreading the environmental stress that originally forced them from their homes." One camp in Mauritania houses nearly half a million refugees. Yet official response has been slight. Says Jacobson, "I don't see anyone grappling with the subject in a way that would lead to systematic action."

Well, it's just a little radioactive

Public Citizen reported last month that the Nuclear Regulatory Commission was about to deregulate as much of one-third of the total volume of so-called "low-level" radioactive waste generated by the nation's nuclear power plants. PC says the result would be a significant increase in the number of fatal cancer cases in the US.

Eastern Europe and Africa

A.M. Babu, writing for Pacific News Service, reports a growth in anti-African sentiment in Eastern Europe since the democratization of those countries. Poland, Hungary and Romania immediately adopted policies of reapprochment with South Africa and encouraged emigration to that country. Further, African students on scholarships in Eastern Europe are being firmly eased out, sometimes leaving their impoverished home governments to foot the bill.



This map, from the Council on Economic Priorities, shows how 1989 spending for the B-2 bomber is being distributed by state. Nine states get less than $1 million. Four states get over $1 billion.

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The McNeil/Lehrer/White Male Newshour

FAIR, which keeps its eye on the media from a progressive point of view, finds that the McNeil/Lehrer Newshour is "narrower, whiter, more mail-dominated, more government-oriented and more conservative than Nightline," which FAIR had blasted last year. Noting M/L's "virtual exclusion of public interest leaders," FAIR charged that the program "mocks the original mandate of public television." The FAIR study, conducted by two Boston College sociologists over a six-month period, found that M/L's 19 most frequent guests included nine US officials (six of them conservatives), and four conservative 'experts.' The guest list was dominated by two right-wing think tanks -- the Center for Strategic and International Studies and the American Enterprise Institute. Guests from groups like the Institute for Policy Study and the World Policy Institute never appeared. Other findings:

- Rightwing participants were often presented as neutral observers.
- 90% of M/L's US guests were white and 87% were male. Conservative Ted Koppel's show did better: 89% white, 82% male.
- Only 6% of M/L's US guests represented public interest, labor or racial & ethnic groups. The figure for Koppel's show was 10%.
- Only one out of 17 guests on environmental issues represented an environmental group.

Interstate comstockery

Although the Maplethorpe affair has gotten the major attention of the media, there are far more disturbing cases of constitutional mayhem by the morality terrorists. Take the Home Dish Satellite Corporation of New York, which beamed hard and soft core sex films to over 1.2 million customers around the country, 22 of them in Montgomery County, Alabama. HDS is now out of business because it is alleged to have violated Alabama's obscenity laws. Governor Cuomo has been asked to extradite the company's top officers, *even though they have never set foot in Alabama.* The case has driven the company into bankruptcy. As Norman Dorsen of the ACLU put it: "It is shocking to think that Alabama could reach out and chill free speech in all 50 states."

Furthermore. . .

In 1989 the Roper Organization found that more Americans thought leisure was more important than work, the first time this view has won a plurality since the question was first asked in 1975.

The combined sentences for the first six Iran-Contra defendants amounted to a mere three years of suspended jail time, 12 years probation, $175,000 in fines and 35 weeks of community service. Oliver North earned more in lecture fees in 1989 than he was required to pay in fines from his conviction.

Meanwhile, Costa Rico's congress has passed, by a 51-1 vote, a resolution urging the government to ban North, John Poindexter, and Richard Secord from entering the country.

Berkeley, CA, pressed to acquire a drug-sniffing police dog, has completed a months-long search to find a politically-correct animal. The choice: a labrador retriever named Pepper. Said a mayoral aide: "This is not an aggressive dog. He does not instill fear by his presence alone."

Two Greens have won seats on the city council of Arcata, CA. In a six-candidate race, one won nearly 80% of the vote, the other 64%.

Former Senator Jim Abourezk, a leading voice for Arab-Americans, reports that he sent Rep. Joe Kennedy a contribution in 1986. It was returned with the explanation from the campaign manager that Kennedy couldn't afford to be associated with Abouresk. More recently, Abouresk wrote Democratic chair Ron Brown to suggest that prominent Democrats appear at Arab-American events. Brown never responded.

Currently, 101 cities violate federal health standards for smog. Just a reminder.

According to the General Accounting Office, 19% of American employers (that's nearly 900,000 businesses) have adopted discriminatory hiring policies as a result of employer sanctions written into immigration laws.

The worldwide fertility rate dropped to 3.5 babies per woman in 1988, down a tenth of a point from the previous year. Some experts believe world population over 9 or ten billion would be disastrous to the planet. Such a limit would require a fertility rate drop to 2 babies per woman by 2000, which doesn't seem probable. Most industrialized countries have a rate around the stable 2 figure, but many less developed countries have rates of 6 or 7.

One of the largest corporate sponsors of the Partnership for a Drug Free America is Phillip Morris.

Danny Boy quoted in the *Quayle Quarterly* from an appearance on CNN last November: "Japan is an important ally of ours. Japan and the United States of the Western industrialized capacity, 60 percent of the GNP, two countries. That's a statement in and of itself."

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Food for Thought

* Every minute 15 children die from lack of food and medicine. Every minute, world-wide military expenses take another $1,900,000 from the public treasury. *(World Military and Social Expenditures,* 1989)

* The chances of dying from social neglect, such as malnutrition and preventable diseases, are 33 times greater than the chances of dying in war. *(WMSE)*

* The United States has a nuclear arsenal equal to 7,000 times the fire power of World War II. (*Bulletin of Atomic Scientists*, 1989)

* The cost of one Trident submarine would pay for a five year program for universal child immunization against six deadly diseases, thereby preventing one million deaths per year. *(WMSE)*

* The developing world has 75 percent of the world's people, but only 17 percent of the world's gross national product, 5 percent of the world's science and technology, 15 percent of the world's energy consumption, 30 percent of the world's food grains, 11 percent of world education spending, 18 percent of world export earnings, 6 percent of world health expenditure and 8 percent of world industry. (*Ten Days for World Development,* Toronto, Canada, 1981)

* Whether through direct casualties or through war-induced starvation, civilians constitute a rapidly growing share of war victims: from 52 percent of all war victims in the 1950s to 85 percent of all victims in the 1980s. (Renner, *National Security*)

* In the developing world, there is one soldier per 240 inhabitants and one physician per 1,950. *(WMSE)*

* Over the last four decades the frequency of wars has increased dramatically: there have been 127 wars since World War II and, with the exception of Soviet intervention in Hungary and Czechoslovakia and the continuing violence in Northern Ireland, all of them have been in developing countries.

* Military budgets in the Third World are about seven times as large as in 1960. *(WMSE)*

* The black population in South Africa is 74 percent of the population, but are forced to live on 13 percent of the land. (*Hunger and Apartheid in South Africa,* Bread for the World, 1989)

* UNICEF estimates that by the end of 1988, as a result of South Africa's destabilization in the area and support of RENAMO and UNITA, a child under the age of five was dying every 3.5 minutes in Mozambique and Angola. That translates to 17 children every hour or 408 each day, or the equivalent of a jumbo jet full of children crashing every day. (*South African Destabilization,* United Nations Economic Commission on Africa, 1989)

* In 1989 the patient/doctor ratio for the white community in South Africa was 400/1, while the ratio for the black population was 90,000/1. (The American Committee on Africa, 1990)

--Bread for the World

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